A

PP

v.

MEGAT SHAHRIZAT MEGAT SHAHRUR

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKIFLI MAKINUDDIN FCJ
RAUS SHARIFF FCJ
[CRIMINAL APPEAL NO: 05-90-2010 (W)]

C

1 JUNE 2011

CRIMINAL LAW: *Penal Code - Sections 302, 304(a) - Reduction of charge - Appeal against - Trial judge reduced charge to one of culpable homicide - Whether trial judge erred - Whether intention to cause bodily injuries likely to cause death - Whether death an imminent or likely result - Difference between ss. 299 & 300 Penal Code - Circumstantial evidence - Whether established - Whether appellate court interfered with finding of facts made by trial judge*

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This was the prosecution's appeal against the dismissal of its appeal by the Court of Appeal which had affirmed the decision of the High Court. The respondent was originally charged for murder under s. 302 of the Penal Code ('the Code') wherein the prosecution had sought to rely on circumstantial evidence to establish a case under s. 300 of the Code. The trial judge ruled that the prosecution had successfully established a *prima facie* case under s. 304(a) of the Code since it fell within s. 299 of the Code and reduced the charge to one of culpable homicide. Upon being called to enter his defence, the respondent pleaded guilty to the reduced charge and was sentenced to 15 years imprisonment. The prosecution contended that the trial judge had erred in its decision since the injuries that were inflicted upon the deceased were done with the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death, thus bringing the case against him under s. 300 of the Code.

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Held (dismissing the appeal; affirming the decision of the High Court)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

I

(1) The difference between s. 299 and s. 300 of the Code was in the degree of probability or likelihood of causing death. *(Tham Kai Yau v. PP;* refd). Thus, if death was an imminent

result, it fell under s. 300 of the Code but if death was a likely result, it fell under s. 299 of the Code. The trial judge was correct in first considering whether a *prima facie* case had been made out against the respondent under s. 300 of the Penal Code. After finding that the prosecution had failed to do so, the trial judge had rightly considered whether it fell under s. 299 of the Code. The applicability of s. 299 only came into question once s. 300 had been ruled out. Further, the evidence adduced failed to provide the necessary ingredients to satisfy the requirements of the special degree of *mens rea* referred to in s. 300 of the Code. (paras 13, 14, 15 & 16)

(2) In cases where the prosecution relied on circumstantial evidence, the evidence produced must have led to the one and only conclusion, which was the guilt of the accused *(Dato' Mokhtar Hashim v. PP;* refd). In this case, the evidence adduced by the prosecution, including that of the witnesses and the surrounding circumstances were not sufficiently strong enough to hold together. Besides, the appellate courts are slow in interfering with finding of facts made by the trial court as the trial judge would have had the opportunity to scrutinize the demeanour of the witnesses during trial. (para 16)

[Respondent's sentence affirmed.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan pihak pendakwaan terhadap penolakan rayuannya oleh Mahkamah Rayuan yang telah mengesahkan keputusan Mahkamah Tinggi. Responden telah pada asalnya dituduh membunuh si mati di bawah s. 302 Kanun Keseksaan ('Kanun') di mana pihak pendakwaan telah bergantung kepada keterangan ikut keadaan bagi membuktikan kesnya di bawah s. 300 Kanun. Hakim bicara telah memutuskan bahawa pihak pendakwaan berjaya membuktikan satu kes *prima facie* di bawah s. 304(a) Kanun memandangkan ianya jatuh di bawah s. 299 Kanun dan mengurangkan tuduhan kepada satu homisid salah. Setelah dipanggil untuk membela diri, responden telah mengaku salah terhadap tuduhan yang dikurangkan tersebut dan telah dihukum penjara 15 tahun. Pihak pendakwaan berhujah bahawa hakim bicara telah terkhilaf dalam keputusannya sejak kecederaan pada si mati dilakukan dengan niat menyebabkan kecederaan badan yang mencukupi dalam keadaan biasa untuk menyebabkan kematian, yang membawa kes terhadapnya di bawah s. 300 Kanun.

A **Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)**
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

B **(1)** Perbezaan di antara s. 299 dan s. 300 Kanun adalah dalam tahap kebarangkalian atau kemungkinan menyebabkan kematian. *(Tham Kai Yau v. PP;* dirujuk). Maka, jika kematian adalah jelas akibatnya, ianya jatuh di bawah s. 300 Kanun tetapi jika kematian mungkin akibatnya, ianya jatuh di bawah
C s. 299 Kanun. Hakim bicara telah dengan betul mempertimbangkan sama ada satu kes *prima facie* telah dibuktikan terhadap responden di bawah s. 300 Kanun. Setelah mendapati bahawa pihak pendakwaan telah gagal berbuat demikian, hakim bicara telah dengan betulnya mempertimbangkan sama ada ianya
D jatuh di bawah s. 299 Kanun. Pemakaian s. 299 Kanun hanya dipersoalkan apabila s. 300 Kanun telah dikesampingkan. Lagipun, keterangan yang telah dikemukakan gagal membekalkan ingredien-ingredien perlu untuk memuaskan keperluan tahap khas *mens rea* yang dirujuk dalam s. 300 Kanun.

E **(2)** Di dalam kes-kes di mana pihak pendakwa raya telah bergantung pada keterangan ikut keadaan, keterangan yang dihasilkan mesti membawa kepada hanya satu kesimpulan, iaitu kesalahan orang kena tuduh. *(Dato' Mokhtar Hashim v. PP;*
F dirujuk). Di dalam kes ini, keterangan yang dikemukakan oleh pihak pendakwa raya, termasuk saksi-saksi dan keadaan sekeliling tidak mencukupi untuk dipegang bersama. Selain itu, mahkamah rayuan adalah lambat dalam mengganggu penemuan fakta oleh mahkamah bicara di mana hakim bicara telah
G mempunyai peluang untuk meneliti tingkah laku saksi-saksi semasa perbicaraan.

[Hukuman responden disahkan.]

Case(s) referred to:
H *Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC* ***(refd)***
Jayaraman Veluyuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
PP v. Wan Razali Kassim [1970] 1 LNS 121 FC ***(refd)***
I *PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC* ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 299, 300, 302, 304(a)

For the appellant - Ahmad Bache DPP
For the respondent - Abdul Kadir Ismail; M/s Abdul Kadir Ismail

[Appeal from Court of Appeal, Criminal Appeal No: W-05-84-2008]

[Editor's note: For the Court of Appeal judgment, please see PP v. Megat Shahrizat Megat Shahrur [2011] 5 CLJ 608.]

Reported by Kumitha Abdul Majid

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] This is an appeal by the prosecution against the dismissal of its appeal by the Court of Appeal which had affirmed the decision of High Court.

[2] The respondent in this case was originally charged under s. 302 of the Penal Code. At the end of the prosecution case the learned High Court trial judge ruled that the prosecution failed to establish a *prima facie* case against the respondent under s. 302 but successfully established a *prima facie* case under s. 304(a) of the same Code. Upon being called to enter his defence, the respondent pleaded guilty to the reduced charge and was sentenced to 15 years imprisonment from the date of his arrest.

[3] We heard this appeal on 19 April 2011 and reserved our judgment. We have considered this appeal and this is our decision.

[4] The facts have been succinctly stated by the Court of Appeal in its judgment. Thus in this judgment we need only restate the basic relevant facts and events as found by the learned High Court trial Judge, undisputed or otherwise.

[5] The respondent and SP4 were lovers. SP4 was the mother of the deceased through an earlier relationship. It is not in dispute that SP4 and the respondent lived together in a master room of an apartment. SP5 and SP7 occupied the remaining two rooms. The deceased did not stay at the said apartment on a permanent basis, as she was taken care of by SP4's mother.

[6] At that point of time, SP4 worked as a Guest Relations Officer at a night club. There were occasions where the deceased had stayed over at the apartment when SP4 had to go to work. In the absence of SP4, the respondent used to take care of the deceased.

[7] On 3 June 2001, the deceased stayed over at the apartment as the respondent wanted to take her to Bukit Jalil for an exhibition the following day. SP4 left for work at about 10pm that day. Thereafter, only the respondent, the deceased, and SP7 were in the apartment. SP7 provided the only direct evidence available in this case.

[8] According to SP7, not long after SP4 left, he saw the respondent hitting and slapping the deceased. The deceased was crying and wanted to escape. SP7 told the respondent not to do so. The respondent however proceeded to put a cushion over the deceased and sat on it. Again SP7 told him to stop but he replied there was no reason for worry as the deceased was sturdy. SP7 then went to bed. He heard some noises from the master room but did not investigate.

[9] As for SP5, he stated that he had reached home about midnight on that day and he saw the respondent and the deceased sleeping in the living hall. Subsequently, the respondent got up and carried the deceased to the master bedroom. According to SP5, the deceased had her eyes shut and it looked as if she was asleep. Later in the night, the respondent knocked on his door and asked for his help to accompany him to bring the deceased to the hospital. Not long after arriving at the hospital, the deceased was pronounced dead.

[10] As mentioned above, the learned High Court trial judge had ruled that there was a *prima facie* case under s. 304(a) of the Penal Code since it fell squarely within s. 299 of the Penal Code and fell short of s. 300 of the same. The respondent was thus ordered to enter his defence.

[11] The prosecution contended in the Court of Appeal and before us that the learned High Court trial judge had erred in arriving at such a conclusion. The prosecution contends that the injuries inflicted upon the deceased were done with the intention of causing bodily injuries which was sufficient in the ordinary course of nature to cause death, and thus fell within the ambit of s. 300 of the Penal Code.

[12] The Court of Appeal took the view that the acts of the respondent were that of with the intention to cause such bodily injury that was likely to cause death. It also held that there was no reason to interfere with the findings of facts made by the learned High Court trial Judge and thus upheld the decision of the trial Court to reduce the charge to one of culpable homicide.

[13] The basic issue therefore is on the difference between ss. 299 and 300 of the Penal Code. In our view the difference is thin but detectable. The difference is in the degree of probability or likelihood of causing death. This is what was said in *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 at p. 176:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.
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> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death;
>
> (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
> The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence

A of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

[14] Thus, if death is an imminent result, it falls under s. 300. If on the other hand, that death is a likely result, it falls under s. 299. It would be safe to conclude that all cases under s. 300 would fall under s. 299 as well, but this is not necessarily so *vice versa.*

[15] We have read and considered the evidence adduced with care in particular that of SP4, SP5, SP7 and SP8. We are of the view that the learned High Court trial judge was correct in first considering whether a *prima facie* case had been made out against the respondent under s. 300 of the Penal Code. After finding that the prosecution had failed to do so, she rightly considered whether it fell under s. 299 of the same. There would be no need to do so if she had found that a case had been made out under s. 300. The applicability of s. 299 only came into question once s. 300 had been ruled out.

[16] We are inclined to agree with the learned High Court trial judge and that of the Court of Appeal for the following main reasons:

a) It is trite law that findings of facts made by the trial court would generally be respected as far as possible. The appellate courts are slow in interfering with such findings as the trial judge would have had the opportunity to scrutinize the demeanour of the witnesses during trial. (See: *PP v. Wan Razali Kassim* [1970] 1 LNS 121).

b) In this case the learned High Court trial judge found SP7 to be a credible witness and gave weight to his evidence. But while we note that SP7's evidence directly implicated the respondent as having hit and sat on the deceased sandwiched with the cushion, at the same time his evidence does not directly establish that the death of the deceased was an imminent result of the acts of the respondent. Indeed SP7 did not know if the respondent sat with his whole body weight or only lightly on the cushion with the deceased sandwiched. There is therefore the issue of causation. Anyway, however the respondent sat on the deceased, it was extremely callous of him for doing such act on a little child of just over two years old.

c) It was also the evidence of SP7 that while he was about to sleep he heard sound of something had fallen coming from the master bedroom where the respondent took the deceased for bath. SP7 did not say that he heard the deceased cry.

d) SP5's evidence disclosed that when he returned home after past midnight he saw the respondent and the deceased sleeping in the living room. When the respondent took the deceased into the master bedroom she was asleep. SP5 did not say whether the deceased was in any serious condition.

e) SP4 in her evidence said that when she left for work around 10pm the deceased was asleep on the sofa placed adjacent to the main door of the apartment. The deceased fell asleep in the car on the way home after dinner. Her evidence appears to be inconsistent with that of SP7 who said that when SP4 left for work, the respondent and the deceased came out of the room to go to the kitchen. This inconsistency does undermine the strength of the circumstantial evidence which the prosecution relied upon to prove its case and to a degree the veracity and weight of SP7's evidence.

f) The prosecution sought to rely on circumstantial evidence to establish a case under s. 300 of the Penal Code. Now, the law on circumstantial evidence is settled. In cases where the prosecution seeks to rely on circumstantial evidence, the evidence produced must lead to the one and only conclusion, which is the guilt of the accused (See: *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101). The standard of proof is beyond reasonable doubt and not any higher standard (See: *Jayaraman Veluyuthan & Ors v. Public Prosecutor* [1982] CLJ 464; [1982] CLJ (Rep) 130). In this case as the pieces of evidence adduced by the prosecution, including that of SP4, SP7, SP5 and the surrounding circumstances, are not sufficiently strong enough to hold together, it is our considered opinion we should affirm the decision of the learned High Court trial judge (See: *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609).

g) There is also the issue of causation and *mens rea*, ie, whether the injuries which resulted in the death of the deceased was actually caused solely by the respondent. We have considered the evidence adduced as above. No doubt the post-mortem report indicated the cause of death as ruptured liver and pancreas and blunt trauma. But was it the result of the act of the respondent sitting on the cushion with the deceased sandwiched as described by SP7? In so acting as he did, was there present in the respondent the necessary degree of *mens*

rea specified in s. 299 but not the special degrees of *mens rea* referred to in s. 300 of the Penal Code? The burden is on the prosecution to discharge based on the evidence adduced. With respect we are of the view that the evidence adduced failed to sufficiently provide the necessary ingredients to satisfy the requirements of the special degree of *mens rea* referred to in s. 300.

[17] Thus, for the above reasons this appeal is dismissed. We also find no reason to interfere with the sentence imposed by the learned High Court trial judge.

[18] We are conscious that the life of a little innocent child is lost and that justice must be done for her. However we are also aware that '(I)t is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. … But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.' per Wan Suleiman SCJ in *Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145.

[19] Appeal dismissed. Sentence affirmed.